



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 82 of 2009**

GEOFFREY NJIRAINI.....APPELLANT

**VERSUS**

VERONICA NJOROGE.....1<sup>ST</sup> RESPONDENT

ESTHER WAMBUI.....2<sup>ND</sup> RESPONDENT

SIMON CHEGE.....3<sup>RD</sup> RESPONDENT

TRUSTEES HOLY SPIRIT SPRINGS REVIVAL CENTRE...4<sup>TH</sup> RESPONDENT

***(Being an appeal against the Judgment of Hon. W. Kagendo, SRM dated 9th April, 2009 in Nakuru CMCC No. 1845 of 2005)***

**JUDGMENT**

This Judgment relates to an Appeal from the Judgment of the Resident Magistrate at Nakuru CMCC No. 1845 of 2005.

In that case, Veronica Njoroge, Esther Wambui and Simon Chege as Trustees of Holy Spirit Springs Revival Centre (*hereinafter called the Respondent*) by an Amended Plaint dated 8<sup>th</sup> January 2007, sought the following orders against Geoffrey Njiraini (*hereinafter called the Appellant*):-

- (1) *A mandatory injunction against the defendant for him to return and allow the Area Chief to release and return the church equipment and/or instruments belonging to the plaintiff's society and open the church building.***
- (2) *A permanent injunction to restrain the defendant from interfering with the activities of the Plaintiff's church and/or society.***
- (3) *A declaration that the church equipment and instruments belong to the Holy Spirit Revival Centre legally registered and independent of any other entity.***
- (4) *Costs and interest.***
- (5) *Special and general damages.***
- (6) *Any other relief that this Honourable court may deem fit and just to grant.***

The Respondents had filed this suit as the registered officials of the Holy Spirit Springs Revival Centre. The Respondents' claim was that on 23<sup>rd</sup> October 2005, the Appellant with his agents invaded the Respondents' premises, disrupted normal church service, removed the sign board and took away or caused the Area Chief to take away church equipment and musical instruments and locked the church thus paralyzing the operations of the church.

The Appellant by his defence dated 24<sup>th</sup> January 2007 denied all the allegations by the Respondents principally that he had any property that belonged to the Respondents. He further contended that the Respondents were a splinter group from a church known as Holy Spirit Revival Center and had never owned the suit property.

During the hearing, it emerged that the dispute herein involved two churches, the Holy Spirit Springs Revival Centre (*hereinafter referred to as "HSSRC"*) and Holy Spirit Revival Centre (*hereinafter referred to as HRSC*). It was alleged that initially there was only one church, HSRC wherein the Appellant herein was the Chairman. In the year 2003, the church faced some challenges. It was in rent arrears of Kshs 580,000/= and was served with a notification that the premises on which it was located had been rented out to another tenant. The Appellant herein together with some church officials deserted the church. Other church leaders met thereafter and agreed to set up a society known as Holy Spirit Springs Revival Centre (HSSRC) and the same was registered on 12<sup>th</sup> May 2005. The Certificate of Registration of the same was produced as Exhibit "I". This church was located in Milangine Plot No. 213A and 271A and according to the Plaintiff it was an independent church and not an affiliation of HSRC. It is alleged that sometime on 23<sup>rd</sup> October 2005 the Appellant together with other unknown persons went into the premises of HSSRC and interrupted the church services and caused musical and other church equipment belonging to HSSRC to be taken by the Chief who also closed up the church. The church premises were however later opened pursuant to a court order on an interlocutory application made by the Respondents. The court further directed that the church building which belonged to the 4<sup>th</sup> Respondent be shared by the members of both churches (*HSRC and HSSRC*). The dispute in the suit therefore related to the church equipment that is in the custody of the Area Chief.

In a Judgment delivered on 9/04/2009, the court found that the disputed equipment was purchased by public funds and both sides participated. It directed that the church equipment and musical instruments be sold and the proceeds shared between the two church groups.

Aggrieved with the said Judgment, the Appellant appealed to this court on 7 grounds namely -

- (1) that the Learned Magistrate erred in law and fact in purporting to grant judgment and made orders for prayers that were not sought for in the pleadings,**
- (2) that the Learned Magistrate erred in law and fact in making findings and granting orders that were not sought for by the plaintiffs and the defendant,**
- (3) that the Learned Magistrate erred in law and fact in making a finding that there were two groups of litigants in the matter and failed to appreciate that the appellant was sued in person and not as a church or a representative of a church and hence arrived at a wrong conclusion in her judgment,**
- (4) that the Learned Magistrate erred in law and fact in ordering for the subdivision of the disputed property against the weight of the evidence on record thereby arriving at a wrong finding and judgment,**
- (5) that the Learned Magistrate further erred in dragging the Registrar of Societies to the execution of the judgment and failed to appreciate that the respondents had not adduced any evidence even on a balance of probability that they had any claim over the suit property,**
- (6) that the Learned Magistrate erred in law and fact in purporting to make orders against**

***an imaginary church group that were not party to the proceedings before the court thereby making an order/judgment incapable of enforcement.***

***(7) that considering the pleadings and evidence before the court, findings and judgment of the trial magistrate cannot be supported in law.***

He therefore prayed that the judgment of the trial magistrate be set aside and the suit in the lower court be dismissed with costs.

The Appeal was argued by way of written submissions. The Appellant's submissions are dated 17<sup>th</sup> April 2012 and those of the Respondents' are dated respectively, 23<sup>rd</sup> March 2012 and 16<sup>th</sup> May 2012. The Respondents conceded to grounds 1, 2, 3, 6 and 7 of the Appeal. This Judgment therefore concerns grounds 4 and 5 of the Appeal.

I agree with the parties herein that the court ought not to have made any orders in favour of HSRC which was not a party to the proceedings. If the court deemed it a proper party to the suit for the proper determination of the dispute then it ought to have ordered that the church be enjoined as a party as provided for under Order 1 rule 10(2) of the Civil Procedure Rules (*now repealed*). The court therefore erred in holding that the church equipment be shared between the 4<sup>th</sup> Respondent and HSRC.

By his submissions dated 17<sup>th</sup> April 2012 and filed on the same day the Appellant contends that there was no evidence of ownership that was produced during the trial. He further argued that the items alleged to have been taken were not particularized and as such the court ought not to have entered judgment in favour of the Respondents. The Respondents however contend that the ownership of church equipment and musical instruments was not the subject matter of the suit, and that they were not required to prove ownership at the hearing as the same could have been borrowed or rented. Their claim is that on the material day the equipment was in use and the disruption by the Appellant caused the Chief to confiscate it. They submit that the onus of proving ownership and authority to claim the same rested on the Appellant.

The Respondents by their Complaint sought a declaration that the equipment was owned by the Respondents. Indeed during the hearing 1st Trustee testified that some of the equipment was purchased by the Respondent's development committee and the rest donated to the church, hence the same was owned by the Respondent. PW2, who was a Bishop in the Respondent Church, also stated that the money for purchase of the equipment had been raised by way of fund raising. It is trite law that he who alleges must prove and therefore the onus was on the Respondents to prove ownership so that the court could make a declaratory order in their favour.

The question or issue is, such fund raising done or held?

The Appellant was able to prove that the church equipment was not owned by the Respondent but that the same was the property of HSRC. He produced Harambee cards to show that there were fund raising events conducted in the years 2002 and 2004 by HSRC for the purchase of musical equipment. This was confirmed by PW1, PW2 and DW1 who attended the events. Furthermore, the Respondents have in their submissions admitted that they do not legally own the same.

At the time of the purchase, PW1 and PW3, the 1st and 3rd Trustees of the Respondent confirmed that they were officials of HSRC. They confirmed that at the time when they were leaving HSRC church to form the new one (HSSRC) the Appellant had deserted the church (HSRC). PW1 further testified that the decision to form another church was made by the elders and officials of HSRC who remained after the Appellant deserted the same. The Respondents therefore had the opportunity and means to take the equipment belonging to HSRC being officials of the church. I agree with the trial court's finding that the equipment was purchased by HSRC and that the 1<sup>st</sup> – 3<sup>rd</sup> Trustees of the Respondent participated in the same as officials of HSRC. I do not however think that the equipment should be sold and the proceeds divided equally between the churches. **Firstly**, HSRC was not a party to the suit and no orders could be made in its favour. **Secondly**, the equipment was purchased by HSRC.

The splinter group had no rights over the same. For this reason a declaration that the Respondents are the owners of the musical equipment cannot be made. Having found that orders cannot be made against a person who is not a party to the suit, then the Respondents request for an order to be issued directing that the maintenance costs for the shared building be divided between the Respondent and HSRC cannot be granted either.

The other prayer related to a mandatory injunction against the Appellant compelling him to cause the area Chief to release the church equipment to the Respondents and re-open the church premises for their use. The Chief testified that a complaint was made to him at the time material to the proceedings about a dispute between the two churches. He therefore confiscated the church equipment on his own accord because there was a threat to peace. He stated that he was impartial and was not acting under the instructions of any of the parties. PW2 who was in church on the material day confirms that the equipment was confiscated by the Chief. Although the court found that he was acting in favour of the Appellant herein and even testified for them, there is no evidence to prove that the Area Chief was acting under the instructions of the Appellant. That being the case he, (*the Appellant*) cannot be compelled to return and/or allow the Area Chief to return the equipment to the Respondent. In addition, the court had by its Ruling delivered on 10/03/2006 directed the Chief to continue holding the equipment until further orders of the court. This prayer therefore cannot be granted as well.

Having largely found no merit in the Respondent's suit, the only question which remains is what happens to the equipment and musical instruments allegedly confiscated by the Area Chief.

There was evidence that it was purchased through Harambee and other individual donations between 2002 and 2004. The Respondent church was not in existence only in 2005. Although the 2<sup>nd</sup> and 3<sup>rd</sup> Trustees were members of HSRC at the time the equipment was purchased, under Section 19 of the Societies Act, (*Cap. 108, Laws of Kenya*), once they ceased to be members of HSRC, they had no legal right to lay a claim to a portion of their offerings and tithes or Harambee contribution. As a splinter group HSSRC has no legal claim over the assets of the old church, HSRC. As a new church it cannot unless upon donation, share the property of another church as it did not participate in its acquisition. In any event the court cannot award the Respondents what was not particularized. The equipment belongs to HSRC to whom it should be surrendered.

For all those reasons the Appeal succeeds, the judgment and orders of the lower court are set aside and the Respondent's suit is hereby dismissed with costs to the Appellant.

**Dated, signed and delivered at Nakuru this 26<sup>th</sup> day of October, 2012**

**M. J. ANYARA EMUKULE**

**JUDGE**